SUPREME COURT, U. S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 630

UNITED STATES OF AMERICA AND STEWART L. UDALL, SECRETARY OF THE INTERIOR, *Petitioners*,

v.

ALFRED E. COLEMAN, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF FOR THE NEW JERSEY ZINC COMPANY, A DELAWARE CORPORATION, amicus curiae

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STATEMENT OF INTEREST OF Amicus Curiae

The New Jersey Zinc Company, a Delaware corporation, was the sole contestee in the administrative proceedings within the Department of the Interior which culminated on June 21, 1967, in the decision by the Solicitor for the Secretary entitled *United States v. New Jersey Zinc Co.*, 74 I.D. 191 (1967). On page 19 of the Government's Opening Brief in this case the Solicitor's Decision is discussed, cited, and quoted, without reference, however,

to the fact that the correctness of the Decision is being challenged in a court action instituted by The New Jersey Zinc Company. [*The New Jersey Zinc Company v. Stewart L. Udall, Secretary of the Department of the Interior of the United States of America,* (D. Colo., Civ. Action No. 67-C-404).] The Company is there contending that the statement quoted in the Government's Opening Brief from *New Jersey Zinc Co.,* is not an accurate statement of the applicable law and that the Solicitor's Decision did not in fact apply the quoted language to the evidence before the Department. Furthermore, the Company is there contesting the correctness of the very statements of law which the Government proffers as settled law on pages 17-20 of its opening brief, where its discussion includes its view of the *New Jersey Zinc* decision.

The interest of The New Jersey Zinc Company which compels its filing of this *amicus curiae* brief is in pointing out that the requirement that the Claimant must show, as to the minerals in the claim, "that there is a market in which they can be profitably marketed" (Government Opening Brief, p. 22), is new to the law of mining. It has never been applied to a case involving metallic minerals prior to the Solicitor's Decision in *United States v. New Jersey Zinc Company.* Its correctness is now being challenged by The New Jersey Zinc Company in the courts.

We urge that this Court should not participate in the Secretary's effort to support his decision in the *New Jersey Zinc* case by having this Court, in this case, support the rule which the Secretary seeks to raise in the *New Jersey Zinc* case. We see this as an attempted "bootstrap" operation. The correctness of the rule applied in the *New Jersey Zinc* case should be determined in the litigation in the lower courts in which the full facts and record will be available.

ARGUMENT

The Government's argument that "a 'valuable mineral deposit' is one from which minerals can be extracted and marketed at a profit" (Government Opening Brief, p. 13, at I) is not limited to the issue in the case here on certiorari, which concerns mining claims located for building stone. The gist of the Government's argument is clearly that the interpretation of the words "valuable mineral deposits" found in 30 U.S.C. 22 requires invocation of a present "profitable marketability test" (Government Opening Brief, p. 17), without regard to the nature and the extent of occurrence of the mineral involved. To reach this conclusion, the Government quotes its own Interior Department Solicitor's *Marketability Rule* memorandum, 69 I.D. 145, 146 (1962), suggests that "the fact is that the *marketability* test is applicable to all minerals" (Government Opening Brief, pp. 18-19 (emphasis added)), and then points to two of its own decisions as support for the rule for which it contends. *Id.*, p. 19: *Julius R. Guglielmetti*, A-27871 (May 13, 1959), and *United States v. New Jersey Zinc Co.*, 74 I.D. 191, 196 (1967).

The Secretary of the Interior by the Solicitor, in reversing the decision of the hearing examiner, denied the Company's patent applications and declared all of its claims null and void. The correctness of this decision is being litigated before the United States District Court for the District of Colorado. The New Jersey Zinc Company is contending in that litigation that the Solicitor applied the wrong principle of law in the *New Jersey Zinc* decision when he required the Company to show an ability to make a present profit from mining its claims. It is being urged that the Solicitor did precisely that in his *New Jersey Zinc* decision, notwithstanding the language quoted

from that decision on page 19 of the Government's Opening Brief. The Company contends further that the quoted language is not an accurate statement of the applicable law.

It is, we think, significant that the Government supports its new present profitable marketability concept of the law with the *Guglielmetti* and *New Jersey Zinc* decisions. In *Guglielmetti,* the claimant offered nothing more than the *hope* that continued excavation would *expose* deposits from which commercial ore *might* be obtained. The Department found that the deposits had *no* value at all. The *New Jersey Zinc* decision is the first decision to insist "that profitability is a requisite to establishing a mineral deposit's valuable character" (Government Opening Brief, p. 19) where the saleability of the minerals involved is unquestioned.

Contrary to the Government's assertion, the "notion that profitability is a requisite to establishing a mineral deposit's valuable character" (Government Opening Brief, p. 19) is a relatively recent development and one for which there is no support in any decisions prior to *New Jersey Zinc* involving minerals of limited occurrence. The Government, in its Opening Brief, pp. 19-20, cites two administrative decisions and one decision of this Court for the proposition that the validity of a mining claim can be made to depend upon something other than the discovery of a *valuable* mineral deposit. The decisions cited by the Government are typical of those which it has cited at one stage or another of the *New Jersey Zinc* case. Not one holds that commercial ore, *i.e.,* ore resulting in a product capable of being sold at a profit, must be exposed before a claimant can locate and patent a mining claim. Some, like *United States v. Iron Silver Mining Co.,* 128 U.S. 673

(1888), simply hold that if the deposit located *can* be secured with profit, that fact *alone* will validate the claim. In others, the circumstances tended persuasively to show the absence of any discovery at all. *See, e.g., Cole v. Ralph*, 252 U.S. 286, 299 (1920), and *Adams v. United States*, 318 F.2d 861, 870 (1963). The latter case also involved a situation where only small quantities of minerals existed on the claims, apparently because they were worked out, or nearly so. Not one decision, we insist, exists prior to *New Jersey Zinc* in which a claimant has been required to establish the existence of a metallic deposit which can be operated with profit. As Lindley pointed out in 1913, "such a theory would make most mining locations impossible." 2 C. LINDLEY, MINES, § 336 at 769 (3d ed. 1913). *Cf. Book v. Justice Mining Co.*, 58 Fed. 106, 124 (D.Nev. 1893), where Judge Hawley pointed out that a requirement that ore of commercial value must be disclosed would lead to absurd, injurious, and unjust results.

Many other decisions of the courts and the Department of the Interior deny the basis of the profitable marketability test now newly applied by the Department. Even the *Cataract* case (quoted on page 20 of the Government's Opening Brief), *Cataract Gold Mining Co.*, 43 L.D. 248 (1914), is not authority for a rule of demonstrable profitability. A careful reading of *Cataract* discloses that the writer, First Assistant Secretary Jones, merely instructed the Commissioner of the General Land Office to apply the test of *Castle v. Womble* to the case before him. To construe *Cataract* as equating profitability with value is to contend that First Assistant Secretary Jones was repudiating his own opinion in *East Tintic Consolidated Mining Co.*, 43 L.D. 79, 81 (1914), decided only five months earlier, where he specifically held that ore in commercial quantities need not be shown. In fact, First Assistant Secre-

tary Finney cited *Cataract* in 1922 for the flat statement that "in connection wtih the matter of discovery it must not be understood that an actual disclosure of commercial ore is essential to a sufficient and adequate discovery." *United States v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 48 L.D. 598, 604 (1922).

Finally, the Solicitor's Memorandum on the *Marketability Rule*, 69 I.D. 145 (1962), contains no mention of a profitability test. The Memorandum considers *marketability*, and the requirement is made that all claimants show that the products to be derived from their claims are saleable. It is said that merely showing the nature of an intrinsically valuable mineral may be enough. This is not the same as a requirement that all claimants must show that the products to be derived from their claims are *profitably* marketable. Demand for the miner's product is required but the requirement in the Government's Opening Brief, p. 18, is that there be "a realistic demand for the mineral at a price sufficiently high to cover the costs of extraction and transportation," which is a new concept not even mentioned by the Solicitor in the 1962 *Marketability* Memorandum. This is so for the reason that it had not yet been announced by the Department. Until now, the Department has followed the rule of *Castle v. Womble*, 19 L.D. 455, 457 (1894), quoted with approval by this Court in *Chrisman v. Miller*, 197 U.S. 313, 322 (1905), as follows:

> • • • where minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met. To hold otherwise

> would tend to make of little avail, if not entirely nugatory, that provision of the law whereby "all valuable mineral deposits in lands belonging to the United States . . . are . . . declared to be free and open to exploration and purchase."

This judicially approved reason for the rule should be as obvious today as it was when the author of that "prudent man" rule went on to say, in *Castle v. Womble*, 19 L.D. 455, 457 (1894):

> For, if as soon as minerals are shown to exist, and at any time during exploration, before the returns become remunerative, the lands are to be subject to other disposition, few would be found willing to risk time and capital in the attempt to bring to light and make available the mineral wealth, which lies concealed in the bowels of the earth, as Congress obviously must have intended the explorers should have proper opportunity to do.

CONCLUSION

The new requirement of present profitable marketability is the issue in *New Jersey Zinc*. The *New Jersey Zinc* case is the only case on which the Government really relies in support of this requirement. It is respectfully submitted that this Court should not determine in this cause whether the decision in *New Jersey Zinc* is correct since it is the subject of current litigation. In the lower courts, the matter may be determined upon a factual record and after full presentation of that important issue.

Respectfully submitted,

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